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Racial Classifications in Law School Admissions

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RACIAL CLASSIFICATIONS IN LAW SCHOOL ADMISSIONS*

The past two decades have been marked by major achievements in the area of civil rights. The judiciary, armed with the equal protection clause of the fourteenth amendment, has been a potent force in this movement toward egalitarianism. Beginning with the landmark case of *Brown v. Board of Education,*[1] wherein the anomalous doctrine of "separate but equal" was officially laid to rest, courts have sanctioned,[2] as well as initiated,[3] remedial programs designed to eliminate the effects of past racial

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[1] 347 U.S. 483 (1954).

[2] The courts have repeatedly rejected attacks on "color conscious" school integration programs. *See, e.g.,* Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968); School Comm'r v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed,* 389 U.S. 572 (1968); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied,* 379 U.S. 881 (1964). *See also* Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied,* 402 U.S. 944 (1971), wherein the court of appeals ruled that discarding the promotional lists previously used to determine appointments for principal and vice-principal in Newark, New Jersey, in order to achieve greater racial balance in the school faculty, did not violate any constitutional rights.

[3] The evolution of school desegregation cases provides an example of increasing court involvement in the area of race relations. Brown v. Board of Educ., 349 U.S. 294 (1955), dealt with the implementation of desegregation principles enunciated by the Court a year earlier. The standard established was "with all deliberate speed . . . ." *Id.* at 301. In the 1963 decision in Watson v. Memphis, 373 U.S. 526 (1963), the Court emphasized that this should not be used as an excuse for delaying desegregation. A year later, the Supreme Court was faced with a case dealing with a desegregation plan in Prince Edward County, Virginia. This county, one of those involved in the original *Brown* decision, had continually avoided implementation. The Court remanded, urging, "quick and effective" relief. Griffin v. County School Bd., 377 U.S. 218 (1964).

By the mid-1960's, it was clear to the judiciary that "[d]elays in desegregating public school systems are no longer tolerable." Bradley v. School Bd., 382 U.S. 103, 105 (1965) (per curiam). Eventually, the Court officially dropped the standard of "all deliberate speed" and required school boards "to come forward with a plan that promises realistically to work, and promises realistically to work *now.*" Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis in original); *accord,* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969), wherein the Court stated that the Fifth Circuit

> should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the

discrimination. Concomitant with the more aggressive state and federal affirmative actions in this regard, however, has been an ever strengthening undercurrent of claims of "reverse discrimination." Courts have had to deal with these accusations on a case by case basis, often viewing such claims as "the height of irony,"[4] or simply "unrealistic."[5] Yet, these assertions cannot be too easily dismissed. Indeed, this issue has spawned a controversy of national proportion mandating consideration not only in terms of constitutional justice, but also in terms of social justice.

The Supreme Court was recently presented with an opportunity to review a claim of reverse discrimination involving preferential admissions policies of a state law school.[6] In *DeFunis v. Odegaard*[7] a white student, denied admission to the University of Washington School of Law (Washington Law School), charged, *inter alia*, that the school's selection process deprived him of equal protection of the law by favoring minority groups. A definitive resolution of the controversy therein had the potential to produce as great an effect upon the civil rights movement as did *Brown* twenty years ago.[8] Certainly, it would have engendered far-reaching implications for minority access to higher education. Moreover, the decision's impact could conceivably have affected segments of society not directly involved.[9]

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obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.

Id. at 20.

The pinnacle of judicial activism in eliminating de jure segregation in public schools was reached by the Supreme Court with its affirmance of a Fourth Circuit plan of busing students in order to effectively implement the holding of *Brown*. *See* Swann v. Board of Educ., 402 U.S. 1 (1971). *See generally* Comment, *From Brown to Swann — The New Role of Equity in Integration*, 23 BAYLOR L. REV. 555 (1971); Note, *Desegregation of Public Schools: An Affirmative Duty to Eliminate Racial Segregation Root and Branch*, 20 SYR. L. REV. 52 (1968).

[4] School Comm'r v. Board of Educ., 352 Mass. 693, 227 N.E.2d 729, 733 (1967), *appeal dismissed*, 389 U.S. 572 (1968).

[5] Fuller v. Volk, 230 F. Supp. 25, 34 (D.N.J. 1964), *vacated on other grounds*, 351 F.2d 323 (3d Cir. 1965), *merits of original opinion adhered to*, 250 F. Supp. 81 (D.N.J. 1966).

[6] DeFunis v. Odegaard, 94 S. Ct. 1704 (1974), *vacating* 82 Wash. 2d 11, 507 P.2d 1169 (1973).

[7] *Id.*

[8] Indicative of the great interest surrounding the controversy and accenting the importance of the issues was the extraordinary number of amicus curiae briefs filed in support of both sides. Sixty organizations submitted a total of thirty briefs to the Supreme Court. In sympathy with the law school's preferential admissions policy were such groups as the Association of American Law Schools, the American Bar Association, the Council on Legal Education Opportunities, the Law School Admissions Council, the American Civil Liberties Union, the Black American Law Students Association, and the Mexican-American Legal Defense Fund. Those allied with DeFunis' contentions included the AFL-CIO, the National Association of Manufacturers, the Advocate Society, the Joint Civic Action Committee of Italian-Americans, the Anti-Defamation League of B'nai B'rith, and the National Jewish Community Rights Council.

[9] Affirmative action programs are most prevalent in the area of employment. Both the federal government and numerous states have established requirements for unions and industry aimed at increasing minority representation. These programs have met with much opposition

Had the Court reversed the Washington Supreme Court and declared preferential admissions policies violative of a displaced white applicant's constitutional rights, every federal and state program aimed at correcting past racial discrimination might have been jeopardized. Conversely, affirmance would have lent itself to the interpretation that ameliorative admissions policies are constitutionally permissible, no matter how adversely individual interests are affected.

To the dismay of those on both sides of the controversy, the Supreme Court avoided direct confrontation of the issues by declaring the case moot.[10] The law school had admitted DeFunis under order of the trial court.[11] Although the lower court was reversed by the Washington Supreme Court, Justice Douglas, as Circuit Justice, granted a stay of judgment pending disposition by the United States Supreme Court.[12] Because the law school authorities announced to the High Court that DeFunis would be permitted to complete his legal studies,[13] it was held that there no longer existed a concrete controversy between the parties.[14]

Whether the Court's analysis of the question of mootness was dictated by precedent is not the concern of this note. Suffice it to say that four dissenting Justices did not feel so compelled and raised strong arguments in support of their views.[15] Irrespective of the validity of the majority's

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but have successfully weathered most challenges in the courts. *See* text accompanying notes 64-96 *infra*. *See generally* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Hill, *New Judicial Perception of Employment Discrimination — Litigation Under Title VII of the Civil Rights Act of 1964*, 43 U. COLO. L. REV. 243 (1972); Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341 (1970).

[10] DeFunis v. Odegaard, 94 S. Ct. 1704, 1707 (1974).

[11] *See id.* at 1705. The lower court had ruled that the law school's admissions policy violated DeFunis' rights under the equal protection clause of the fourteenth amendment. *See* text accompanying notes 45-48 *infra*.

[12] 94 S. Ct. at 1705.

[13] By the time the Supreme Court heard the parties' arguments, DeFunis had registered for his final term. The Court was assured that DeFunis would be allowed to remain a student for the balance of any term for which he was enrolled. *Id.* at 1705-06.

[14] *Id.* at 1707.

> Since [DeFunis] has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. . . . The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests."

Id. at 1706 (citations omitted).

[15] Justice Brennan dissented on the issue of mootness, noting:

> I can thus find no justification for the Court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome of a controversy to assure that "the questions will be framed with the necessary specificity, that the issue will be contested with the necessity [sic] adverseness

decision, the issue of reverse discrimination will almost certainly present itself again[16] and its merits will then have to be considered. Therefore, it is by no means a frivolous exercise to examine the status of the reverse discrimination controversy left unresolved in *DeFunis*.

Three theories for handling the problem were espoused during the course of the litigation. The state superior court invalidated the admissions program on the ground that the Constitution mandated similar treatment for all races.[17] Consequently, affirmative action, using racial classifications to remedy past discrimination, would appear violative of this dictate. The Washington Supreme Court, adopting a different approach to the equal protection considerations, reversed the lower court's holding.[18] Though finding the racial classification to be suspect, the court felt a compelling state interest, *viz.*, the need for minority lawyers, warranted the use of the school's admissions program. Finally, a more moderate approach was suggested by Justice Douglas' dissent in the United States Supreme Court.[19] He believed racial classifications could be employed to equalize qualification standards but found it impermissible to allow preferential treatment for members of one race over better qualified members of another.[20]

The following discussion will analyze each of the aforementioned theories. The justifications for each approach, as well as the weaknesses inherent therein, will be set forth. In any such analysis, it must be kept in mind that legal considerations cannot be divested of their social impact. Indeed, establishing a workable solution to the present dilemma "is a task which is characteristic of important social problems both in its ease of description and in its resistance to solution."[21]

THE FACTUAL SETTING IN *DeFunis*

It is essential to note that the basic program under attack was not employed solely by the Washington Law School. On the contrary, since the mid-1960's, such admissions policies have been increasingly utilized by institutions of higher education. A recent study indicated that the vast

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> and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution," . . . there is no want of an adversary contest in this case . . . . The case is thus ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues.

Id. at 1722 (footnotes ommitted).

[16] *See* Kohn, *N.Y.U. Law Faces a 'DeFunis' Suit*, 172 N.Y.L.J. 64, Sept. 30, 1974, at 1, col. 3.

[17] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. Kings County, Sept. 22, 1971).

[18] DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973).

[19] DeFunis v. Odegaard, 94 S. Ct. 1704 (1974) (Douglas, J. dissenting).

[20] *Id.*

[21] Vieira, *Racial Imbalance, Black Separatism and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969) [hereinafter cited as Vieira].

majority of accredited law schools have adopted special programs aimed at increasing minority enrollment.[22] As the use of special admissions criteria has expanded, such programs have become increasingly vulnerable to attack. The ineluctable challenge finally materialized when a charge of reverse discrimination was leveled against the Washington Law School.[23]

Marco DeFunis, a white University of Washington graduate, was refused admission to the law school for the term commencing September, 1971. Upon discovering that of the 44 minority students accepted, 36 had lower grades and Law School Admissions Test (LSAT) scores than his own,[24] DeFunis brought suit in the state superior court. His primary contention was that the law school maintained a dual set of admissions standards, *viz.*, one for minority students, and another for the remaining applicants. He argued that this classification deprived him of equal protection of the law as guaranteed by the fourteenth amendment.[25]

In recent years, the number of individuals seeking admission to law schools has increased significantly.[26] That the Washington Law School has not escaped this influx is evident from the fact that within the brief span of four years, 1967 to 1971, the number of applications it received rose from 618 to 1601.[27] Though the number of people desiring to enter the school had grown, the number of available seats had not risen proportionately. Thus, the law school had only 150 seats available for its entering class of 1971.[28] Since most of the applicants would have been considered qualified under prior standards,[29] the process of elimination was most difficult.

To allocate the available openings among the vastly disproportionate number of applicants, the Committee on Admissions developed certain standardized criteria. Initially, a Predicted First-Year Average (PFYA) was calculated for each applicant. By use of a formula which combined an

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[22] *See* EDUCATIONAL TESTING SERVICE, GRADUATE AND PROFESSIONAL SCHOOL OPPORTUNITIES FOR MINORITY STUDENTS 30-44 (5th ed. 1973-74). The survey indicated that of the 122 accredited law schools examined, the 104 employed an active recruiting program which involved special minority admissions procedures. For a thorough and informative examination of many aspects of minority admissions programs, see *Symposium — Minority Admission Programs*, 2 U. TOL. L. REV. 277 (1970).

[23] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. Kings County, Sept. 22, 1971).

[24] DeFunis had a junior-senior grade point average of 3.71 out of a possible 4.0 and an average LSAT score of 582.

[25] 82 Wash. 2d. at ____, 507 P.2d at 1178.

[26] The Association of American Law Schools estimates that approximately 82,000 persons completed law school applications in 1973. The total number of applicants permitted to enroll was 37,018. Brief for Association of American Law Schools as Amicus Curiae at 3, DeFunis v. Odegaard, 94 S. Ct. 1704 (1974).

[27] 82 Wash. 2d at ____, 507 P.2d at 1172.

[28] *Id.*

[29] The Association of American Law Schools indicated that of the 82,000 applicants to law schools in 1973, "70,000 would be considered qualified in terms of quantitative predictors of success in law school." Brief for Association of American Law Schools as Amicus Curiae at 3, DeFunis v. Odegaard, 94 S. Ct. 1804 (1974).

applicant's undergraduate grade point average (GPA) and LSAT scores, his first year law school average could be estimated.[30] These preliminary rankings allowed for an initial categorization of all applications. Once the PFYA for each applicant was established, however, the treatment of nonminority and minority applicants differed considerably.

Several hundred applications yielding the lowest predicted averages in the nonminority group were rejected unless the committee chairman found something in the applicant's file warranting additional consideration. The practical effect of this process was elimination of most nonminority applicants with PFYA's below 74.5. Those candidates with PFYA's above 77 were reviewed by the entire committee as their applications were received. These applicants were considered most promising and generally were admitted after one committee member conducted a thorough review of each file and presented his findings to the others. The remaining group of candidates, *i.e.*, those with PFYA's between 74.5 and 77, were held in abeyance until the deadline for applications had passed. Marco DeFunis' PFYA of 76.23 placed him in the latter category. Eventually, these applicants, along with those with PFYA's below 74.5 whom the chairman felt merited further attention, and a small number with PFYA's above 77 about whom there was some question upon initial consideration, were divided among the seven members of the admissions committee.[31] The full committee then met to hear and vote on the recommendations submitted by these individual members.[32]

Minority applicants were treated in a significantly different fashion.[33]

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[30] *See* DeFunis v. Odegaard, 94 S. Ct. 1704, 1708 n.1 (Douglas, J. dissenting).

[31] Chief Justice Hale of the Washington Supreme Court noted that: "[e]ach member of the committee, including student members, was given approximately 70 files upon which to make recommendations for admission or rejection . . . ." DeFunis v. Odegaard, 82 Wash. 2d 11, ___, 507 P.2d 1169, 1193 (1973) (dissenting opinion). He cited this as one example of the arbitrariness of the school's policy.

[32] *Id.* at ___, 507 P.2d at 1173-74.

[33] Not every minority group was given special consideration. The school decided that only Black Americans, Chicano Americans, American Indians, and Phillipine Americans were to be given extra attention. This particular aspect of its program received a great deal of criticism. There were no specific reasons advanced by the school for the choices it made. However, the law school did explain that, in its opinion, Oriental Americans were not in need of assistance since they were more than proportionately represented in the school when compared with the overall population of the area. This rationale loses much of its argumentative value when it is observed that blacks made up 2.2% of the student body while 2.1% of the Washington population was black. Justice Douglas observed this statistic and later chided:

> The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many "compelling" would give members of one race even more than *pro rata* representation.

DeFunis v. Odegaard, 94 S. Ct. 1704, 1718 (1974) (Douglas, J. dissenting) (emphasis in original).

Additionally, the only method used in determining whether a particular applicant was a member of the preferred minority group was to look at whether he had checked the appropri-

Particular attention was paid to the non-quantitative factors of their applications and the "applicant's racial or ethnic background was considered as one factor in [the] general attempt to convert formal credentials into realistic predictions."[34] Unlike the nonminority applicants, no minority candidates, regardless of their PFYA's were initially considered by the committee chairman for summary rejection. Additionally, treatment of minority applicants varied as to the distribution of files among committee members. Instead of a random procedure, each minority applicant's file was assigned to a currently enrolled minority student and to the faculty member who had been involved in a special summer program for potential law students from disadvantaged backgrounds.[35] The remaining minority candidates were assigned to the assistant dean. The recommendations of these members were reviewed by the full committee for final determination. At no time were minority applicants compared with nonminority candidates.

As a result of the overall admissions process, 275 letters of acceptance were mailed, of which 44 were sent to minority candidates.[36] Normal attrition among the chosen group of 275 was expected to reduce the number to the desired 150.[37] A waiting list was established which classified the remaining applicants into one of four quartiles. DeFunis was placed in the fourth or lowest category. This precarious position on the waiting list left DeFunis among the most vulnerable and, as expected, he received his letter of rejection in August. Of the eventual 150 students in the entering class of 1971, 18 were members of a minority group.[38]

PERMISSIBILITY OF MINORITY CONSCIOUSNESS IN ADMISSIONS CLASSIFICATIONS

The Washington Superior Court's Rationale

DeFunis' attack upon the admissions policy of the law school presented the state superior court with several issues. Specifically, plaintiff questioned the use of LSAT scores where an applicant's GPA was extremely high. He objected to the school's method of averaging his three LSAT scores in predicting his first year average and urged that only his last, and highest, score should have been employed in the calculation.[39]

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ate box on his application. This was cited as extremely arbitrary by the dissenter in the Washington Supreme Court, 82 Wash. 2d at ____, 507 P.2d at 1189, and by Justice Douglas. 94 S. Ct. at 1708.

[34] 82 Wash. 2d at ____, 507 P.2d at 1174. The law school explained this procedure in its *Guide for Applicants*, a copy of which was sent to all who applied for admission.

[35] The University of Washington conducted a "summer enrichment" program for its minority candidates in 1971, through the Council on Legal Education Opportunities (CLEO), a federally funded program instituted in 1968. *Id.* at ____, 507 P.2d at 1175.

[36] 82 Wash. 2d at ____, 507 P.2d at 1176.

[37] *Id.*

[38] *Id.*

Pointing to the presence of students on the admissions committee and to the use of non-numerical standards, he argued that the program involved an arbitrary process exceeding the discretionary power of school authorities.[40] DeFunis further contended that residents of the State of Washington should be given preference over non-residents. Finally, and most importantly, the court was asked to decide whether the school's minority program constituted a violation of the equal protection clause of the fourteenth amendment.[41]

The University, in defending its policies, urged that the state had vested the responsibility for decisions on admissions in the University Board of Regents,[42] which had legally transferred that authority to the law school faculty. The courts, it claimed, had no right to interfere with the exercise of discretion inherent in admissions decisions. Futhermore, the school took exception to DeFunis' contention that the PFYA was the only proper criterion to be employed in admissions decisions. The calculation of the PFYA, it argued, was merely a necessary preliminary step in the entire process of admissions. In response to plaintiff's fourteenth amendment argument, the school asserted that its minority program was a form of "benign discrimination"[43] aimed at a legitimate and justifiable purpose

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[39] DeFunis took the LSAT three times. The first time he received a score of 512, the second time he advanced to 566, and the third time he scored 668. *Id.* at ___, 507 P.2d at 1173. The average of these grades, 582, was used by the School in calculating DeFunis' PFYA. The purpose of averaging the three scores was explained by the Washington Supreme Court:

> If an applicant has taken the LSAT more than once in the past 3 years, the average score is employed rather than the latest score; this is done to offset a learning effect which statistical studies by the Educational Testing Service indicates [sic] occurs as the result of the multiple taking of the test.

Id.

[40] *Id.* at ___, 507 P.2d at 1185.

Chief Justice Hale of the Washington Supreme Court considered the presence of students on the committee a most disturbing factor. In his dissent, he stated:

> Although each of the two law student members possessed full voting powers and served with exactly the same authority as each of the five faculty members, the record is devoid of any standards applied as basis for their appointment to the committee on admissions.

Id. at ___, 507 P.2d at 1193.

[41] *Id.* at ___, 507 P.2d at 1177.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

U.S. CONST. amend. XIV, § 1 (emphasis added).

[42] *See* WASH. REV. CODE ANN. § 28B.20.130(B) (1970).

[43] Classifications aimed at implementing "programs which attempt to redress the effects of past racial discrimination by giving special treatment to particular racial groups . . . have become known as 'benign racial classifications.'" Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1067, 1104-05 (1969) [hereinafter cited as *Developments in the Law*].

and, therefore, did not violate the equal protection clause.[44]

All of DeFunis' contentions were eventually dismissed with the exception of his claim based upon the equal protection clause.[45] After acknowledging the school's meritorious intentions, Judge Shorett nonetheless felt the minority enrollment program wielded a double-edged sword. In his opinion, the majority of those admitted under this policy were less qualified than the plaintiff and others similarly situated. Concentrating entirely on numerical indicia, he stated:

> [S]ome minority students were admitted whose college and aptitude test scores were so low that had they been whites, their applications would have been summarily denied.[46]

Thus, DeFunis was found to have been denied the equal protection of the law guaranteed by the fourteenth amendment. Judge Shorett concluded that the Supreme Court's decision in *Brown v. Board of Education,*[47] was controlling, and noted:

> After that decision, the Fourteenth amendment could no longer be stretched to accomodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause.[48]

Consequently the school was ordered to admit DeFunis.

The Color-Blind Constitution Doctrine

Essentially, Judge Shorett was declaring that the Supreme Court, in *Brown,* not only overruled the *Plessy v. Ferguson*[49] doctrine of separate but equal, but also adopted a literal interpretation of Justice Harlan's dissent therein. Justice Harlan had noted:

> *Our Constitution is color-blind,* and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . .[50]

This phrase has often been cited by opponents of affirmative action programs to support their contention that racial classifications are per se unconstitutional. It is clear, however, that Justice Harlan was addressing

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[44] As noted by Charles E. Odegaard, President of the University of Washington:

> The fundamental purpose of the university's affirmative action program in admissions is to fulfill the obligation called for by the Fourteenth Amendment by providing equal educational access to all, including those who have been educationally disadvantaged.

57 A.B.A.J. 1234 (1971).

[45] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. Kings County, Sept. 22, 1971).

[46] *Id.*

[47] 347 U.S. 483 (1954).

[48] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. Kings County, Sept. 22, 1971).

[49] 163 U.S. 537 (1896).

[50] *Id.* at 559 (Harlan, J. dissenting) (emphasis added).

himself to the problems of blacks as a group and, more particularly, to the white supremacists who were responsible for the problems.[51] He believed that the majority decision in *Plessy* would perpetuate racial discrimination. When his lone dissent was finally heeded in 1954, discrimination had, indeed, become thoroughly entrenched in American society. In light of the continued presence of the discrimination problem, therefore, it is arguable that Justice Harlan would not oppose the use of racial classifications to correct that which he could not prevent.

The language of the *Brown* Court was directed explicitly at the evils of school segregation. The decision did not involve affirmative action programs seeking to remedy past racial discrimination. Looking beyond *Brown,* therefore, it is reasonable to conclude that the Court did not intend race to be excluded from consideration in all classification schemes. In fact, the Court, in *Bolling v. Sharpe,*[52] reiterated the policy of viewing racial classifications as suspect, thus refusing to take the further step of holding them unconstitutional per se.[53] This is not without significance, especially since the "color-blind" concept was an available option which the Court chose to disregard. Thus, important questions with regard to the use of racial classifications seem best directed to their limits, not their plausibility.

Judicial Implementation of Minority Consciousness

Whether the *Brown* decision was intended to preclude the use of racial

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[51] This is evident when the entire statement is examined:

> The white races deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect to civil rights, all citizens are equal before the law.

Id.

[52] 347 U.S. 497 (1954).

[53] The court in *Bolling* stated:

> Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.

Id. at 499 (footnote omitted); *accord,* Korematsu v. United States, 323 U.S. 214 (1944), wherein the Court commented:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

Id. at 216. *See* Gegan, *De Jure Integration in Education,* 11 CATH. LAW 4, 12 (1965), wherein the author states that "[t]here is no purpose to a 'rigid scrutiny' unless there are cases that might survive it." *See generally* Tussman & tenBroek, *Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949). *See also* Lange & Polak, *Equal Protection and Benign Racial Classifications: A Challenge to the Law Schools,* 21 AM. U. L. REV. 736, 742 (1972).

classifications under all circumstances is, concededly, debatable. What is certain, however, is the judicial interpretation which *Brown* has received over the past twenty years. As the Washington Supreme Court observed in reversing the trial court: "[A] racial criterion *may* be used—and indeed in some circumstances *must* be used—by public educational institutions in bringing about racial balance."[54]

School Desegregation Utilizing Racial Classifications

Courts, in their attacks upon de jure segregation in public schools, have consistently deemed racial consciousness to be an appropriate remedial posture.[55] Logically, if school authorities are constitutionally forbidden from instituting segregated school systems, they should be equally forbidden from perpetuating such systems by ignoring racial considerations. The Fourth Circuit applied this reasoning in *Wanner v. School Board*[56] to permit a local board to change artificial boundary lines that had been contrived to insure segregation. The court therein stated:

> When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions . . . their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances.[57]

Of particular significance is *Swann v. Board of Education,*[58] wherein the Supreme Court allowed school authorities to consider race as a valid criterion in determining the composition of individual schools. The color-blind interpretation of *Brown* was rejected, and the Court held that the Constitution may be construed in a color conscious manner in order to undo the effects of past segregation and prevent its perpetuation. The opinion is particularly appropriate to *DeFunis* not only with regard to racial consciousness but also for its suggestions as to the extent of the discretionary powers of school authorities:

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[54] 82 Wash. 2d at ____, 507 P.2d at 1179 (emphasis in original).

[55] *See, e.g.,* Swann v. Board of Educ., 402 U.S. 1 (1971); Alexander v. Homes County Bd. of Educ., 396 U.S. 19 (1969) (per curiam); Green v. County School Bd., 391 U.S. 430 (1968); United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd,* 380 F.2d 385 (en banc), *cert. denied,* 389 U.S. 840 (1967); Kelly v. Metropolitan County Bd. of Educ., 317 F. Supp. 980 (M.D. Tenn. 1970). *See generally* Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment From the Civil Rights Act of 1875,* 38 MISS. L.J. 179 (1967).

[56] 357 F.2d 452 (4th Cir. 1966).

[57] *Id.* at 454. *See* Loving v. Virginia, 388 U.S. 1 (1967).

> [I]f [racial classifications] are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

Id. at 11; *accord,* McLaughlin v. Florida, 379 U.S. 184 (1964).

[58] 402 U. S. 1 (1971).

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .[59]

On the same day the *Swann* decision was handed down, the Court invalidated North Carolina's anti-busing law, which proscribed the use of race as a means to establish racial balance in public school.[60] While so acting, the Court expressly clarified the intent of the *Brown* mandate:

> [T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education* . . . . Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.[61]

Even in cases of de facto segregation, courts have often allowed local school boards discretionary power to initiate remedial policies. Though they generally avoid ordering specific ameliorative steps,[62] courts have re-

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[59] *Id.* at 16; *accord,* Green v. County School Bd., 391 U.S. 430 (1968). In United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969), the district court had set a ratio of two blacks for every twelve teachers in a school. Rejecting this "fixed mathematica," the court of appeals modified the order and replaced it with an initial requirement of "substantially or approximately" a one-to-five ratio. The Supreme Court reversed and reinstated the district court order because it promised to work now.

[60] North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

[61] *Id.* at 45-46; *accord,* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd,* 380 F.2d 385 (en banc), *cert. denied,* 389 U.S. 840 (1967).

[62] *See, e.g.,* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), *cert. denied,* 380 U.S. 914 (1965); Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964). *But see* Springfield School Comm'n v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.,* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

Compare Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), *with* Milliken v. Bradley, 42 U.S.L.W. 5249 (U.S. July 25, 1974). In *Keyes,* the Supreme Court appeared to be taking a harder line toward de facto segregation. It ruled that a finding of de jure segregation within a "meaningful portion" of a school system created a presumption of unconstitutional segregation in the rest. However, in the recent *Milliken* decision, the Court appears to have moved in the other direction. The Court reversed and remanded a lower court order requiring an inter-district remedy for school segregation. Chief Justice Burger stated:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation. Thus an inter-district remedy might be in order where the racially

fused to enjoin school boards from taking such action to remedy segregation resulting from residential patterns.[63] For example, the Second Circuit, in *Offermann v. Nitkowski*,[64] held that although no constitutional duty to undo de facto segregation rested upon local school boards, to so act was not unconstitutional. The court commented that when racial considerations are employed in achieving equal educational opportunity, "we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem."[65]

In light of the aforementioned decisions, the superior court's conclusion in *DeFunis* that the color-blind approach is the only safe path to follow would seem unwarranted.[66] *DeFunis*, however, raised a more sensitive issue than that involved in school desegregation.[67] Clearly, no one is deprived of an education through the institution of school integration procedures. The goals sought to be attained are equality of education and diversification of the student body. No one would contend that one race is being preferred over the other. This, however, is not the case where law school admissions are concerned. Although DeFunis was accepted by four other law schools,[68] it is conceivable that the policies practiced by the Washington school could have resulted in the absolute denial of a legal education to another nonmi-

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> discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy.

Id. at 5258. For a detailed discussion of *Keyes*, see Note, *Toward the Elimination of DeFacto Segregation in Public Schools*, 20 CATH. LAW. 60 (1974).

[63] *See* Wanner v. County School Bd., 357 F.2d 452 (4th Cir. 1966); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964). *See generally* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 715 (1971).

[64] 378 F.2d 22 (2d Cir. 1967).

[65] *Id.* at 24-25.

[66] DeFunis v. Odegaard, No. 741727 (Wash. Super. Ct. Kings County, Sept. 22, 1971).

[67] Even those who support preferential admissions policies have raised the issue of reverse discrimination as possibly too great a sacrifice for the white majority. *See, e.g.*, Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV. 1063 (1968) [hereinafter cited as Hughes]. While Professor Hughes recognizes the need for sacrifices in eliminating the substandard conditions of blacks in this country, he adds:

> The cost must of course be minimized and nobody should be asked to bear too heavy a burden of sacrifice. If one white student were to be denied a college education at all, the sacrifice would be too great reasonably to be imposed.

Id. at 1072.

[68] DeFunis could have pursued legal studies at the University of Idaho, the University of Oregon, Gonzaga University or Williamette University. 82 Wash. 2d at ____, 507 P.2d at 1181 n.11.

nority student. Therefore, the classification, though ameliorative in intent, would not be "benign" to such an individual. This important distinction comprises the heart of the present controversy. Although the school desegregation cases establish the permissibility of minority consciousness, they do not dispose of the crucial issue of reverse discrimination in the present context.

Minority Consciousness in Employment Programs

The closest analogy to preferential admissions policies may be found in the affirmative action programs affecting labor unions and employment practices. In this area, *Carter v. Gallagher*[69] provides an insight into both the problems facing a court and the various solutions that may be reached where allegations of reverse discrimination are encountered. In *Carter* the district court found the hiring procedures employed by the Minneapolis Fire Department to be blatantly discriminatory.[70] Statistical evidence revealed that although blacks comprised 6.44 percent of the population in Minneapolis, none of the 535 men in the department were black.[71] Consequently, the fire department was ordered to institute changes in its testing procedures designed to eliminate discriminatory hiring practices. Furthermore, the court, noting that immediate measures were required to remedy the present effects of past discrimination, imposed a limited minority preference scheme. The order mandated that the department hire twenty minority persons who met the revised qualification standards.[72]

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[69] 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[70] 452 F.2d at 323.

[71] *Id.*

> Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.

United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.) (footnotes omitted), *cert. denied*, 404 U.S. 984 (1971).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court held that in determining whether an employer had invalidly excluded a particular person or group from employment, statistics could be utilized as proof of a discriminatory pattern. *See* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970). *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

[72] 452 F.2d at 318.

> When a court has determined that a violation of Title VII has occurred, it is vested with broad remedial power to remove the vestiges of past discrimination and to eliminate and prevent both present and future barriers 'to the full enjoyment of equal job opportunities by qualified black workers.'

United States v. Local 212, Electrical Workers, 472 F.2d 634, 636 (6th Cir. 1973), *quoting* United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *accord*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970);

Defendants appealed, contending that the order violated the fourteenth amendment.[73] They argued that in allocating the minority positions as required, an employer would be compelled to discriminate against white applicants possessing superior comparative qualifications. It was further claimed that "upon the basis of approved and acceptable job related tests and standards,"[74] whites would be entitled to priority "but for the minority preference requirement . . . ."[75]

The Court of Appeals for the Eighth Circuit concurred with the findings of the district court as to previous discrimination.[76] However, the absolute preference was ruled unconstitutional on the ground that prior discriminatory policies could not justify the present racial discrimination against better qualified nonminority applicants.[77] In so holding, the court relied upon *Griggs v. Duke Power Co.*,[78] believing that the Supreme Court therein had set the limits on affirmative action in employment practices. The *Griggs* Court had stated:

> Congress did not intend by Title VII [of the Civil Rights Act of 1964,] . . . to guarantee a job to every person regardless of qualifications. In short, the Act does command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[79]

United States *ex. rel.* Mitchell v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1968); *cf.* Swann v. Board of Educ., 402 U.S. 1 (1971).

[73] Carter v. Gallagher, 452 F.2d 315, 324 (8th Cir. 1971).

[74] *Id.* at 324.

[75] *Id.*

[76] *Id.* at 326.

[77] The court stated:

> The fact that some unnamed and unknown White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

Id. at 325.

[78] 401 U.S. 424 (1971).

[79] *Id.* at 430-31. This language by the Court is closely paralleled by the anti-preference provision Section 703(j) of Title VII of the Civil Rights Act. That section provides that:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or

> employed in, any apprenticeship or other training program, in comparison with the total number of [*sic*] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000(e)-2(j) (1970).

On appeal in *Carter*, the Eighth Circuit, en banc, dealt with the three-judge panel's reliance on *Griggs* and with § 703(j) as if they presented the same arguments against the percentage goals instituted by the district court. The court noted that its concern in the present case was with "§ 1981 of the old Civil Rights Act and the provisions of the Fourteenth Amendment." 452 F.2d at 329. Therefore, § 703(j) was deemed inapplicable. Still, the court commented that "even the anti-preference treatment section of the new Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices." *Id.*

The various circuits have consistently rejected attacks on district court orders founded upon the anti-preference provision. In United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir. 1970), the Sixth Circuit held:

> When the stated purposes of the Act and the broad affirmative relief authorization . . . [42 U.S.C. § 2000e-6] are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation . . . resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices.
>
> Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.

428 F.2d at 149-50. *See* United States v. Ironworkers Local 86, 443 F.2d 544, 554 (9th Cir. 1971) ("The district court neither abused its discretion in ordering the affirmative relief, nor did it in any way establish a system of 'racial quotas' or 'preferences' in violation of section 703(j)."); Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969) (district court held to have done "no more than ensure that the injunction against further racial discrimination would be fairly administered."). *Cf.* Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 21 (1st Cir. 1973), *cert. denied*, 42 U.S.L.W. 3594 (Apr. 22, 1974), wherein Chief Judge Coffin, relying upon cases rejecting § 703(j) attacks, dismissed a contention that an analogous Massachusetts provision proscribed a requirement of specific minority preference in the construction trade.

See generally Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 692 (1974), wherein Professor Blumrosen observes:

> The political realities are that Section 703(j), and other qualifying provisos of Title VII, were inserted to satisfy those who were concerned with statutory overkill. But each such qualifying clause contains its own internal compromise which restricts its impact where discrimination is found. Thus the most that can be said is that section 703(j) stands against the proposition that employment opportunities are to be allocated throughout the nation by reference to race, color, or sex. It does not address the question of the use of a numerical standard as a remedy for discriminatory hiring practices unless the remedy were to produce the proscribed mechanical allocation . . . .
>
> I believe that the actions of Congress in 1972, in rejecting proposed amendments to Title VII which would have prohibited 'discrimination in reverse' and made section 703(j) applicable to the executive order, confirm the view that Congress intended to permit effective affirmative action remedies where discrimination was found, including the use of numerical standards under the conditions described here.

(footnotes omitted). The Congressional debates to which Professor Blumrosen refers appear in 118 CONG. REC. 691-706, 2275-76 (1972).

Upon rehearing en banc in *Carter*,[80] the question of the appropriate remedy was the only real issue. Although the ban on a hiring quota was vacated, the district court's absolute preference scheme was not adopted. The full court believed a solution could best be found in a balancing of the two previous decisions. Two considerations had to be reconciled — 1) the possibility resulting from an absolute preference, of a present infringement upon the rights of nonminority applicants either equally or better qualified, and 2) the legitimate goal of eradicating the present effects of past discrimination. The court resolved the conflict by imposing a ratio for hiring based upon the racial composition of the population of the area.[81] It ordered that one of every three new employees should be a minority person, until twenty were hired.[82] Thereafter, hiring was to be conducted purely on the basis of superior qualifications.[83]

The Seventh and Third Circuits have also permitted the use of minimum ratios based on race to achieve greater equal employment opportunity.[84] On each occasion, the courts were asked to rule on the validity of a

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[80] Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir. 1971).

[81] *Id.* at 330.

[82] The court noted:

> While some of the remedial orders relied on by the plaintiffs and the Government ordered one to one ratios, they appear to be in areas and occupations with a more substantial minority population than the Minneapolis area. Thus we conclude that a a one to two ratio would be appropriate here, until 20 qualified minority persons have been hired.

Id. at 331.

In Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973), the Second Circuit faced a similar problem to the one involved in *Carter*. Upon finding that the New York City examination for fire-fighters resulted in disproportionate representation of blacks and Hispanics in the fire department, the district court invalidated the testing procedure. It ordered the institution of a job-related exam and later promulgated a hiring ratio of three whites to one minority person until all minority individuals of the eligibility list had been hired. The court of appeals affirmed, stating:

> It is quite true that the judge's 3:1 ratio does not purport to rest on any scientific basis. But neither does the plaintiffs' proposal, and the intervenors' figure does not take account of factors the judge was permitted to consider. In arriving at a ratio midway between what would have been appropriate on the basis of correcting the inequities of Exam 0159 alone and the plaintiffs' demands for much more extensive relief, the judge took appropriate account both of the resentment of non-minority individuals against quotas of any sort and of the need of getting started to redress past wrongs.

Id. at 398-99.

[83] The court justified its decision by noting:

> Such a procedure does not constitute a 'quota' system because as soon as the trial court's order is fully implemented, all hirings will be on a racially non-discriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions.

452 F.2d at 330-31.

[84] *See* Southern Illinois Builder's Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

plan initiated under the authority of Executive Order 11246.[85] The order, designed to promote equal opportunity in federal employment, contained a provision requiring construction contractors, bidding on any federal or federally assisted construction contract to take affirmative steps toward ensuring that no discrimination was practiced in their hiring and promotion procedures.[86] The Secretary of Labor, authorized to establish all appropriate implementation guidelines, adopted regulations demanding specific goals of minority manpower utilization.[87]

As a result of these regulations, the Department of Labor issued an order barring the use of additional federal funds in highway construction in certain areas of Illinois. The Department had determined that the required equal employment opportunity did not exist for minority workers. To remedy this situation, an affirmative action program, the Ogilvie Plan, was promulgated by the governor of Illinois.[88] Directed at the recruitment, placement, and training of minority group members in the highway construction industry, the plan established the position of "advanced trainee" for all minority applicants lacking the skills of a journeyman. A minimum

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[85] Exec. Order No. 11, 246, 3 C.F.R. 169 (1974).

[86] *Id.* at 170.

[87] 41 C.F.R. § 60-1.40(a) (1974). The gross underrepresentation of minority groups in the construction industry is an established fact. *See* Hill, *Racial Practices of Organized Labor: The Contemporary Record*, in THE NEGRO AND THE AMERICAN LABOR MOVEMENT 313-14 (J. Jacobson ed. 1968). Unions have restricted their membership and have thus been the main factor in limiting access of racial minorities. *See Hearings on Employment and Manpower Problems in the Cities: Implications of the Report of the National Advisory Commission on Civil Disorders Before the Joint Economic Com.*, 90th Cong., 2d Sess. at 38 (1968). To combat this situation, the regulations, promulgated in 1968, demand that contractors adopt affirmative action plans which

> provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity.

41 C.F.R. § 60-1.40(a) (1974).

Since the appearance of the two pilot affirmative action plans created pursuant to the regulations—the Cleveland and Philadelphia Plans—there have been numerous "hometown" plans developed. Once such a plan is approved by the Secretary of Labor, programs adopting the plan are then eligible for federal funds and cooperative contractors involved meet the requirements of Executive Order 11246. Many of these plans have been challenged in the courts but most have fared well. *See, e.g.*, Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (validating Newark plan); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970) (validating Cleveland plan).

[88] On June 3, 1970, following the order of the United States Department of Transportation to withhold highway construction funds from Madison and St. Clair Counties due to lack of equal employment opportunites, the governor established "An Agreement to Facilitate Equal Employment Opportunity in Madison and St. Clair Counties." (Ogilvie Plan). The plan was instituted in order to conform to the guidelines of Executive Order No. 11246. *See* Southern Illinois Builders Ass'n v. Ogilvie, 471 F.2d 680, 681 (7th Cir. 1972). *See generally* Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U.L. REV. 225 (1971).

ratio of one advanced trainee to four journeymen was required for each craft.

The unions' challenge to the institution of these measures was rejected by the Seventh Circuit Court of Appeals in *Southern Illinois Builder's Association v. Ogilvie.*[89] The court therein observed that minority membership in the highway construction industry was minimal due to gross underrepresentation in construction unions. Before the introduction of these corrective measures, there had been no pretense that minorities could not qualify for positions. They were simply denied admission to labor unions. Since contractors relied upon the unions for manpower referral, the unions were able to perpetuate discriminatory practices. While there was no simple solution, the need to eradicate this injustice was overpowering.

Here, as in *Carter,* the use of the ratio was viewed as an essential means of satisfying the obligation to take affirmative action.[90] It was seen as a necessary step to encourage victims of previous discrimination to seek employment under the present standards. The plan validly attempted to eliminate the self-perpetuating process of exclusion of minority manpower. As such, the court felt that the plan did not "impermissibly prefer black persons nor [did] it discriminate against white persons. . . ."[91]

Both the *Carter* and *Ogilvie* courts cited *Contractors Association v. Secretary of Labor*[92] in support of their holdings. *Contractors,* like *Ogilvie,* involved a plan promulgated under Executive Order 11246. The "Philadelphia Plan," created by order of the Department of Labor, obligated construction contractors in the Philadelphia area to submit an affirmative action program with all bids on federal contracts. The plan's validity was challenged by several contractors.[93]

The court rejected plaintiffs' claim that the plan unconstitutionally compelled them to classify by race and refuse to hire some white persons, terming this contention an oversimplification. It found that the order was designed to deal with the fact that minorities were flagrantly underrepresented in key trades because of union discrimination. The Executive Order

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[89] 471 F.2d 680 (7th Cir. 1972), *aff'g,* 327 F. Supp. 1154 (S.D. Ill. 1971).

[90] As stated by Judge Poos in the district court:

> [T]here is no infallible and certain formula which will erase decades of history and alter a distasteful set of circumstances into a utopian atmosphere . . . . Basic self-interests of the individual must be balanced with social interests, and in circumstances where blacks have been discriminated against for years, there is no alternative but to require that certain minorities be taken into consideration with respect to the specific minority percentage of the population in a given area in order to provide a starting point for equal employment opportunities.

327 F. Supp. at 1159.

[91] 471 F.2d at 686.

[92] 442 F.2d 159 (3d Cir. 1971).

[93] The contractors maintained that the plan violated their due process rights since the unions are responsible for the underrepresentation and, therefore, should be required to remedy the problem. *Id.* at 174.

was felt to demand more than a mere freezing of the status quo; rather, it mandated remedial action. Consequently, the court viewed the plan as an acceptable use of color consciousness involving no reverse discrimination.[94] The minority manpower goals could be achieved "without adverse effects on the existing labor force."[95] As in *Ogilvie,* no white person would be displaced as a result of the plan's implementation.

At first glance, the aforementioned decisions would appear to support the law school admissions policy in *DeFunis*. There are additional factors however, that must be considered before substantial reliance is placed upon these holdings. Not the least of these considerations is the fact that the Supreme Court has never passed upon the validity of any of the programs at issue in the above controversies. In fact, the closest step taken by the Court in the area of employment discrimination falls short of demanding specific goal-oriented action and arguably supports the no-preference viewpoint.[96] More importantly, however, the employment affirmative action cases can be distinguished on several substantive grounds. First, the use of employment ratios was viewed merely as a temporary solution. Minority preference hiring, as in *Carter,* would not be required once the process of testing had been corrected to eliminate any racial bias and geared toward job-related problems. The program developed by the Washington Law School presented no corresponding remedy. Significantly, the preference apparently would continue indefinitely since the school made no attempt to determine whether its usual admissions process was defective.[97] Secondly, it was recognized in most of the employment

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[94] Clearly the Philadelphia Plan is color-conscious. Indeed the only meaning which can be attributed to the 'affirmative action' language which since March of 1961 has been included in successive Executive Orders is that Government contractors must be color-conscious.

Id. at 173.

[95] *Id.* at 176. The court was convinced "that the specific goals may be met, considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force." *Id.*

[96] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed in text accompanying notes 78-79 *supra*.

[97] The interim nature of measures taken to correct minority underrepresentation in the employment area is a positive feature which lends support to affirmative action advocates. Once it has been established that the tests utilized in the hiring process are designed to exclude minorities, they can be replaced by job-related examinations. In most cases, this will place minorities on an equal footing with their white counterparts and the source of the imbalance will have been eliminated.

In the case of preferential admissions policies, as advanced by the Washington Law School, the corrective measures, if condoned by the Court, will necessarily operate over a longer period of time since the equalizing process would require corresponding changes at lower rungs of the educational ladder. If one concedes that minority groups are subjected to educational disadvantage throughout their academic careers, a preference accorded at the graduate or professional level does nothing to reach the problem at its roots. Thus, there may appear to be no end to the use of a preference, a fact that clearly diminishes its desirability.

If, however, cultural bias in the admissions process is the real source of underrepre-

cases that, although the tests utilized in the industry could determine the presence or absence of basic qualifications, they might not be able to rank "qualified applicants with precision, statistical validity, and predictive significance."[98] Thus, there was no proof that minority members hired under any of these plans were less qualified than whites. In *DeFunis,* however, the school itself admitted that its policy resulted in the acceptance of some candidates who were less qualified.[99]

It is readily apparent, therefore, that *DeFunis* raised the strongest "reverse discrimination" challenge that the judiciary has thus far faced. Thus, the remedies fashioned in the desegregation and employment cases are not directly applicable. However, these decisions leave no doubt as to the demise of the theory of a color-blind constitution; each of them advances the proposition that minority consciousness as a means of remedying the effects of past discrimination should not only be tolerated but encouraged.

EQUAL PROTECTION ARGUMENTS IN SUPPORT OF REVERSE DISCRIMINATION

The decisions involving desegregation plans and affirmative action employment programs set the stage for the Washington Supreme Court's handling of the issues raised by *DeFunis*. Clearly, the Washington court could easily dispute the color-blind concept relied on by Judge Shorett. This, however, did not dispose of the more crucial issue related to the limits of racial consciousness. The Washington Supreme Court's thorough analysis of the equal protection challenge evidences an awareness of the features that set *DeFunis* apart from the other cases. Nevertheless, its conclusions appear to overlook the real novelty of the issues presented.

Standards for Review of Governmental Action

All laws classify in some degree and, to that extent, there will be an element of inequality in most. Thus, it is apparent that the equal protection clause does not demand that all individuals be treated equally under the law in all cases.[100] In determining whether or not governmental action violates the constitutional guarantee, a court must examine the nature of

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sentation, then a closer analogy to the temporary ratios of the employment cases is available. The elimination of the biased examination and substitution of a culturally neutral procedure would insure that any "preference" would be temporary. Following an initial equalization, the admissions process could continue without further need of artificial assistance. *See* text accompanying notes 142-45 *infra*.

[98] Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971).

[99] 94 S. Ct. at 1711.

[100] It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.
Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 343 (1949).

a particular classification, the individual interests affected by it, and the governmental interests asserted in support thereof.[101] The first of these three considerations will govern the scope of judicial scrutiny with regard to the latter two.

Under the traditional equal protection test, the key is reasonableness.[102] The governmental purpose must be proper, and the classification in question must be rationally related to the achievement of that purpose.[103] In applying the traditional test, the Supreme Court has stated: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[104] The character of certain classifications, however, requires that they be inspected more carefully. If the classification affects a "fundamental right,"[105] or is premised on certain "suspect

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[101] *See* Dunn v. Blumstein, 405 U.S. 330, 335 (1972). In Williams v. Rhodes, 393 U.S. 23 (1968), the Court stated:

> [T]his court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

Id. at 30; *accord,* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 725 (1973).

[102] *See* James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

Justice Brandeis, dissenting in Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928), explained the traditional equal protection standard as follows:

> Discrimination through classification is said to violate that clause only where it is such as 'to preclude the assumption that it was made in the exercise of legislative judgment and discretion.' In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.

Id. at 405-06 (citations ommitted).

[103] The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972), *citing* Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Gulf, Colo. & Santa Fe R.R. v. Ellis, 165 U.S. 150 (1897); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[104] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[105] The right to vote, for example, has been deemed a fundamental right. *See* Dunn v. Blumstein, 405 U.S. 330 (1972). In Evans v. Cornman, 398 U.S. 419, 422 (1970), the Court stated

criteria,"[106] it must be closely scrutinized. Consequently, the reasonableness standard, with its attendant presumption that the state acted rationally,[107] is replaced; a stricter test, requiring the state to show a compelling interest in perpetuating the classification, is substituted.[108]

Interestingly, none of the courts that have previously dealt with a claim of reverse discrimination clearly enunciated which standard was applicable.[109] In fact, while resolving equal protection controversies, these courts seemed to misplace their emphasis on the disadvantage a person suffers as a result of a particular classification. In so doing, the main issue of different treatment of individuals was virtually ignored. The courts went to great lengths to establish that no whites were injured by the policies implemented. This led to the conclusion that the equal protection clause was not violated. However, a mere showing that a classification results in different treatment for different groups should be sufficient to call into question its validity under the equal protection clause.[110] Recognizing this in confronting Washington Law School's dual admissions procedure, the Washington Supreme Court directly addressed itself to equal protection analysis. Its initial task was choosing the applicable standard of review.

Race As a Suspect Criterion

> Racial classifications are generally thought to be 'suspect' because throughout the country's history they have generally been used to discriminate officially against groups which are politically subordinate and subject to private prejudice and discrimination.[111]

Invidious racial classifications — those that stigmatize a racial group with the stamp of inferiority — have been held unconstitutional because no compelling interest seemingly existed to justify their use.[112] In addition,

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that "before th[e] right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *See also* Bullock v. Carter, 405 U.S. 134 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

The right to travel has also been acknowledged as fundamental. *See* Shapiro v. Thompson, 394 U.S. 618 (1969), wherein the Court held:

> [I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Id. at 634 (emphasis in original).

[106] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race).

[107] *See* note 104 and accompanying text *supra*.

[108] *See* cases cited in notes 105 & 106 *supra*.

[109] *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

[110] *See Developments in the Law, supra* note 43, at 1076.

[111] *Id.* at 1107.

[112] [T]he Equal Protection Clause requires the consideration of whether the classifica-

racial classifications have traditionally been deemed "irrelevant to any possible public purpose."[113] However, when the public purpose is to increase minority representation, and the classification itself appears to be benign, not invidious, the question arises as to whether the rational basis test should substitute for the compelling interest standard.[114] As noted by Judge J. Skelly Wright, the rational basis standard may be more appropriate under these circumstances.

> [T]he function of equal protection . . . is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational *and* because in *our* society it would not stigmatize whites.[115]

Support for this lenient standard of judicial review in reverse discrimination controversies can be gleaned from an examination of the purpose of the fourteenth amendment. There can be no doubt that its immediate goal was to insure equality for former slaves.[116] This does not mean that the principles of the amendment are not universal in their application to all persons.[117] However, when confronted with claims by the majority race that programs aimed at fulfilling the original mandate violate its principles, courts can certainly take the amendment's general purpose into consideration in the balancing process.[118] Consequently, a program designed

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> tions drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

Loving v. Virginia, 388 U.S. 1, 10 (1967). *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v Kraemer, 334 U.S. 1 (1948); *Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[113] Hirabayashi v. United States, 320 U.S. 81, 101 (1943).

[114] Where racial classifications are being used ostensibly to remedy deprivations arising from past and continuing racial discrimination, however, a court might think it proper to judge the measures by a less stringent standard of review, possibly even the permissive or rationality standard normally used in constitutional appraisal of regulatory measures.

Developments in the Law, *supra* note 43, at 1107.

[115] Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 18 (1968) (emphasis in original).

[116] *See Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

[117] Indeed, though Justice Miller had stated in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), that he felt it was doubtful "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," *id.* at 81, the equal protection clause was subsequently applied to other than minority race problems. *See, e.g.*, cases cited in notes 105 & 106 *supra*.

[118] We do not say that no one else but the negro can share in this protection . . . . But

to promote, rather than injure, the interests of minorities might appear to warrant only minimal scrutiny.

Though the argument for less rigid scrutiny of purportedly benign racial classifications deserves consideration, it is more likely that courts will employ the compelling interest test when confronted by a racial classification that is not benign toward all parties affected. Indeed, the Washington Supreme Court found that the stricter standard was warranted by DeFunis' claim of reverse discrimination. Elaborating, it stated that though the purpose of the classification was constructive and remedial, it was not benign in its effect on displaced white students.[119] Strong arguments can be made in support of this view. Clearly, the broad social changes being sought may only be accomplished at the expense of some individuals' rights.[120] However, it would seem more acceptable if, as implied by the compelling interest doctrine, this expense be incurred only to correct extreme conditions. Furthermore, the possibility exists that the future hostile classification may find support in prior decisions upholding a benign classification. "[W]hat appears to be benign today may well be exposed as invidious tomorrow."[121] Thus, it may work to the benefit of all that a compelling interest be demanded of any classification that involves race.

Compelling State Interests in Law School Enrollments

There are morally and socially "compelling" state interests which attest to the benefits to be gained by increased minority enrollment in law schools. The shortage of minority attorneys is acute. For example, while blacks comprise at least 12 percent of the nation's population, they comprise approximately 1 percent of the legal profession.[122] Such statistics may indicate that the profession as currently structured, does not meet the

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> what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the prevading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872).

[119] 82 Wash. 2d at ____, 507 P.2d at 1182.

[120] *See* Hughes, *supra* note 67, at 1072.

[121] Comment, *Increasing Minority Admissions in Law Schools — Reverse Discrimination?*, 20 BUFFALO L. REV. 473, 480 (1971). *See also* Vieira, *supra* note 21, at 1612 ("Experience surely suggests that in matters of race what seems benign one year may be exposed as invidious the next.") *See generally* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699 (1971).

[122] ASS'N OF AM. LAW SCHOOLS, REPORT OF THE ADVISORY COMMITTEE FOR THE MINORITY GROUPS STUDY, 1967 PROCEEDINGS, pt. 1, § I, at 160. Even more disturbing is the fact that only 17% of this group practice in the South where the majority of blacks live. Gellhorn, *The Law Schools, and the Negro*, 1968 DUKE L.J. 1069, 1073 (1968) [hereinafter cited as Gellhorn].

needs of minority communities. The low percentage of black lawyers certainly does nothing to refute the claim that "[l]egal services are still the preserve of middle and upper incomes."[123]

An increase in the number of minority law students will lead to both long and short-term benefits for society as a whole and for the minority community. Arguably, clients' rights would be more effectively protected by attorneys who share similar backgrounds and characteristics. It is also possible that a minority individual would more readily seek redress for grievances by resorting to the legal process if he could repose his trust and confidence in a lawyer of a minority race.[124] Additionally, the inextricable link between the legal profession and the political process illustrates that equal access to policy making decisions can best be achieved through the involvement of attorney representatives of the minority community. As stated by the Washington Supreme Court, "[I]f minorities are to live within the rule of law, they must enjoy equal representation within our legal system."[125]

The position of respect held by a minority attorney may further serve to promote state interests. The socio-economic importance is evident when it is recognized that disrespect for a group as a whole is closely connected to that group's economic depression. Elimination of one will often lead to elimination of the other.[126] Additionally, the position of respect generated by the status of an attorney will have a beneficial effect on minority youth. A young person may see these attorneys as models to emulate, as individuals who started with the same disadvantages as himself, yet who were able to achieve success. This, in turn, will promote greater faith in the system by helping to eliminate the claim that the "white man's" law is controlling.

Another goal found constitutionally compelling by the Washington court was that of achieving diversity in the law school's student body.[127] The learning process consists of more than mere academic pursuit. The interaction that occurs between students is an educational experience in itself. Diversification promotes understanding and cultural exchange. Instead of a limited perspective, both minority and nonminority students, through their interaction, can develop a broader understanding of the problems facing society.[128] Indeed, the United States Supreme Court, in recognizing the intangible qualities of a law school, has stated:

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[123] *See* Gellhorn, *supra* note 122, at 1074.

[124] *See* Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor*, 20 J. LEGAL ED. 21, 22 (1967).

[125] 82 Wash. 2d at ____, 507 P.2d at 1184.

[126] *See* Hughes, *supra* note 67, at 1069.

[127] 82 Wash. 2d at ____, 507 P.2d at 1184.

[128] The sex of a student, his or her work experience or lack of it, and the area of the country in which he was raised will provide a variety of backgrounds against which the individual law student will perceive law and the role of lawyers in society.

Brief for Association of American Law Schools as Amicus Curiae at 13, DeFunis v. Odegaard, 94 S. Ct. 1704 (1974).

> The law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[129]

It is vital that lawyers, in their roles as policy makers, be aware of the problems and desires of all segments of society.

Balancing a Suspect Classification Against Compelling State Interests

Certainly, these factors are all commendable and indeed necessary goals toward which to strive. Generally, a law school maintains the right to determine which, if any, of these criteria shall be considered in judging an applicant's qualifications for admission. This discretionary power is the preserve of the academic community and not usually susceptible to judicial interference. "What places [*DeFunis*] in a special category is the fact that the school did not choose one set of criteria but two, and then determined which to apply to a given applicant on the basis of his race."[130] This approach raises the question whether the admittedly valid state interests previously discussed justify the selection of one person over another purely on racial grounds. The Washington Supreme Court answered in the affirmative and in so doing may have lost sight of the requirements of the equal protection clause.

While a court may, and indeed must, take social and moral ideals into consideration when rendering a decision, its primary concern must be with the law. The law is the framework and the instrumentality through which these other interests are achieved. It assures an orderly process intended to protect, as best it can, the interests of all individuals. The equal protection clause, an integral component of the law, best exemplifies the constant struggle for equitable results. Not only must there be legitimate intentions behind a particular policy, but also the actual effects produced by the program cannot serve to unduly burden a particular class. The Washington Supreme Court simply looked to the worthiness of the goal as justification for any means aimed at its achievement. This, however, is not consistent with the requirements of equal protection. "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."[131]

In reply to DeFunis' due process claims as to the arbitrary and capricious character of the admissions policy, the court conceded that if the acceptable aims could be accomplished by some method other than racial classification the validity of the disputed plan could not be upheld.[132] It

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[129] Sweatt v. Painter, 339 U.S. 629, 634 (1950).

[130] DeFunis v. Odegaard, 94 S. Ct. 1704, 1710 (1974) (Douglas, J., dissenting).

[131] *Id.*

[132] 82 Wash. 2d at ____, 507 P.2d at 1185.

properly concluded, however, that since the aim of the law school was to increase minority enrollment, the consideration of race was the only effective means to do so. Yet, consideration of racial factors need not result in the granting of preferential treatment on the basis of race. The program employed by the law school was not an affirmative action plan designed to actively recruit qualified minority persons. It was a program of racial preference conducted in an arbitrary manner which ignored the very essence of the goals of affirmative action. In effect, the school had merely ignored previous inequities in its policy and had instituted new ones. The Washington Supreme Court meritoriously presented compelling reasons for implementing a race conscious admissions policy. Unfortunately, it eventually validated an arbitrary program of racial partiality.

RACIAL CLASSIFICATION ABSENT PREFERENTIAL TREATMENT

The United States Supreme Court found itself confronted with a difficult situation upon examining *DeFunis*. The case had served as a catalyst, initiating an intense national debate that obscured the particular facts involved. The issues had been drawn not around the policies of the Washington Law School, but around the entire area of race conscious affirmative action programs. As a result, two camps had been formed — one opposing remedial action on the ground that it is detrimental to nonminority persons, and the other favoring some form of "temporary reverse discrimination" to make amends for past deprivations. A decision on the merits would have placed the Court on one of those sides no matter how carefully it attempted to limit its holding to the specific facts. It would have been extremely difficult for the Court to reverse the Washington Supreme Court's decision without sounding a death knell for the use of other race conscious programs, such as affirmative action employment plans.[133] At any rate, the Court neatly evaded both the case and, for the moment, the issue.

The Court, however, did take the opportunity to note that

> *[i]f the admissions procedures of the Law School remain unchanged,* there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken.[134]

This, perhaps, was a cue to school authorities that their policies are in need of certain changes. The standards which should guide the formulation of admissions policies, in light of this warning, remain unsettled. The answers may lie in an examination of Justice Douglas' dissenting opinion, wherein he establishes a middle ground approach to the problem.

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[133] *See* text accompanying notes 69-96 *supra*.

[134] 94 S. Ct. at 1707 (emphasis added) (footnote omitted).

Justice Douglas rejects the idea that the issue must necessarily pit the traditional meritocratic process against egalitarian principles. Instead, he envisions a union of these two concepts. Though his decision was not, and probably never will be, adopted by the Court in its entirety, it is deserving of close scrutiny. It is a clear admonition to the Washington Law School that laudable goals do not justify unacceptable means. At the same time, however, it points to valid methods of accomplishing the aim of increasing minority enrollment.

The theme of Justice Douglas' opinion is racial neutrality. Throughout, he employs the phrase "in a racially neutral way," indicating an outright rejection of racial preference.[135] Additionally, however, he points out the necessity of racial classifications under the present system of law school admissions. Despite the apparent incongruity in such an approach, none exists. Justice Douglas was able to distinguish, where the Washington court did not, between classification by race and selection by race. The latter is constitutionally impermissible. The former is not only a legitimate means, but the only means of effectively selecting "in a racially neutral way."[136]

Basic to an understanding of Justice Douglas' opinion is his distaste for such standardized yardsticks as the Law School Admissions Test (LSAT). He views the LSAT as rewarding the ability to answer questions while stifling creativity and independence.[137] He feels these exams are

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[135] There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

Id. at 1716.

[136] *Id.* at 1717.

[137] The numerical indicators normally used by law schools to evaluate an applicant's qualifications may prove inadequate when applied to a disadvantaged minority member. Many standardized exams are thought to be "culturally biased." *See* Note, *The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children*, 61 GEO. L.J. 1027 (1973). The author theorizes that the use of standardized tests results in a mislabeling of poor or minority children within the educational system.

> The hypothesis of mislabeling begins with the contention that in the historical development of standardized intelligence tests neither racial nor socio-economic subpopulations have been properly considered. The norming groups used in the re-scaling of sample scores have not been truly representative of the background and cultural development of certain children being tested — those who are not white and middle- or upper-class. This deficiency is dictated by the demographic composition of the total population, race being closely aligned with socio-economic status and not being a controlled factor in constructing sample groups. Moreover, since the white, middle-class segment of the population has exerted the primary influence in operating the

fraught with "cultural bias" and thus prove inadequate when applied to a minority person. Additionally, he notes that the admissions policies of law schools need not be based solely upon numerical data. Indeed, other factors such as recommendations, employment experience, and even geographical origins have been used to supplement the qualitative elements of an application.[138] A committee could validly look to the particular obstacles an individual has faced and conquered during his life to determine his potential for success.[139]

Such an approach would require a thorough examination of each applicant, an administratively tedious task. However, it would avoid the application of a racial standard, since

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> American educational system, public schools naturally have perpetuated the language, literature, and values of that segment. Hence, not only have the designers of intelligence tests included in the normative groups primarily white, middle-class children, but this pattern of 'Anglo-centricity' has been reinforced by the continued use of items on these tests which measure performance by the standards of a white, middle-class society.
>
> The end result is that standardized intelligence tests do not in fact measure the innate mental ability of disadvantaged children, but rather the degree of their cultural orientation to an alien, though dominant society.

Id. at 1030-31.

Similar hypotheses have been applied to the law school admissions process to support those who favor a change in procedures designed to overcome the "cultural bias."

> Qualifications to study law should not be confused or equated with methods used to *determine* qualifications, unless, of course, the methods used to determine qualification are inclusive of all possible methods. It would be of little value to say one has the ability to study law if there were no possible way to determine that ability. The question is: how is qualification to be determined? . . .
>
> None of the . . . justifications for present methods of determining qualification to study law are applicable to the Negro youth. He has not been sufficiently exposed to cultural advantages and educational materials which tend to develop innate abilities . . . . This being true, many Negro youth may be excluded from the study of law, not because they lack ability, but rather because inappropriate means of determining their ability have been and are being employed . . . . The only satisfactory test to determine a Negro's ability to study law is to afford him an opportunity to do so.

Carl & Callahan, *Negroes and the Law,* 17 J. LEGAL ED. 250, 258-59 (1965) (emphasis in original). *But see* Graglia, *Special Admission of the "Culturally Deprived" to Law School,* 119 U. PA. L. REV. 351 (1970), wherein the author states:

> If 'cultural deprivation' means lack of exposure to and experience with difficult written materials and abstract reasoning, it will undoubtedly adversely affect performance on the LSAT and in college. There is no reason, however, to think that it will adversely affect performance in law school any less . . . . It is difficult to accept that 'cultural deprivation' results not in deficiency in essential law school skills but merely in ability to demonstrate them and that they are likely to appear for the first time in law school.

Id. at 358.

[138] 94 S. Ct. at 1710.

[139] To illustrate this point, Justice Douglas suggests a black ghetto resident, who has struggled every step of the way through college, may, in the eyes of the admissions officer, evidence traits which would allow for his selection over a Harvard graduate from a rich family who has not made better use of the opportunities presented to him. *Id.* at 1713.

> a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the committee.[140]

Thus, without selecting according to race, and by concentrating less on LSAT scores, a school could constitutionally use its discretion and follow a policy which would increase its minority enrollment.

The Washington Law School, however, did not employ any such guidelines. It chose to rely more on neat subcategories than to make individual judgments. The school classified by race and applied a separate standard to minority groups, resulting in less qualified applicants being admitted. This was particularly distasteful to Justice Douglas, who asserts that no race is unable to academically compete with another.[141] All that is required is an equalization of the qualification standards.

Justice Douglas further reasons that although the school did not utilize an absolute racial preference, the effect of its program was to apply certain unascertainable standards to one group on the basis of race. The result, whether it be termed a quota or not, was to limit the number of possible places in the school available to DeFunis and other white students similarly situated. Comparing minority applicants solely with other minority applicants necessitated the reservation of a certain number of seats for those of the selected group. Justice Douglas concluded that this selection process involved classification by race to the disadvantage of DeFunis and had to be strictly scrutinized under the equal protection clause. However, he never expressly reveals the possible compelling interests to be considered in testing the classification.

The import of his opinion lies in its establishing the distinction between the utilization of race as a classification and its use as a tool of selection. Racial classification is not necessarily at odds with a policy of treating "each application *in a racially neutral way*."[142] As Justice Douglas points out, once it is apparent that the indicia relied upon by a school are "culturally biased" numerical tests, the admissions procedure is tainted. The only logical solution, therefore, is to filter out those who would be adversely affected and process them separately—the result being selection based on individual merit. Classification by race merely serves the limited function of identifying those who are culturally disadvantaged. This must

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[140] *Id.*

[141] It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience may in an extreme situation justify differences in racial treatment that no fair-minded person would call 'invidious' discrimination. Mental ability is not in the category. All races can compete fairly at all professional levels.

Id. at 1719.

[142] *Id.* at 1714 (emphasis in original).

be done, "lest race be a subtle force in eliminating minority members because of cultural differences."[143] Herein lies the necessity for the racial classification. If admissions committees fail to recognize race as a factor, they eliminate the possibility of fairly evaluating one whose cultural background is different from the so-called "organization man."

Society's goal, declares Justice Douglas, should not be an homogenization of its people, nor should it be an absolute separation by race or ethnic background with "Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for the Irish."[144] Diverse groups comprise this "melting pot," and the various cultures should have an opportunity for fair treatment. A categorization by race in order to evaluate a minority person's capabilities would assure that his race does not "militate against him." At the same time, such a procedure need not result in the granting of a preference. Preferential selection on racial grounds is anathema to Justice Douglas, who condemns deviations from the dictates of equal protection simply because meritorious social goals can be presented in justification. To permit such deviations would result in "constitutional guarantees [acquiring] an accordionlike quality."[145] Justice Douglas believes the suggestion that minority groups cannot successfully compete without a crutch creates just as severe a stigma of inferiority as does segregation.

Justice Douglas concedes that inescapable problems would be encountered by both schools and courts should proportionate representation of selected minority groups be required. The difficulty in determining standards to judge which groups are in need of this benefit would place a school's discretionary authority constantly before the courts. Consequently, he proposes that educators must be able to make discretionary judgments. However, in making such judgments, they should be required to consider "applications in a racially neutral way," thereby avoiding equal protection challenges.

The Douglas dissent is concluded with what appears to be a contradiction in terms. On the one hand, he declares that a racial preference granted by a state school at the professional level is "invidious" discrimination. Yet, he hesitates to conclude that the Washington policy entailed such a preference. However, implicit in his discussion is the warning that in the future, similar programs may not pass constitutional muster.

CONCLUSION

The concept of a "color-blind" constitution is clearly without validity. There can be no doubt that racial consciousness is an essential ingredient in the process of reversing the effects of years of segregation and discrimi-

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[143] *Id.* at 1715.
[144] *Id.* at 1718.
[145] *Id.* at 1719.

nation. Consequently, the utilization of some form of racial classification is mandated. However, the limits of such categorizations, as well as the fate of programs employing them, remain uncertain.

Affirmative action programs aimed at increasing minority representation in traditionally segregated areas of employment have survived the strongest of challenges in the courts. The evidence of past discrimination combined with federal mandates to correct the situation have greatly contributed to this success. Claims of "reverse discrimination," the most potent arguments in opposition to remedial measures, have been faced and found unconvincing. The judiciary has thus far been able to validate affirmative action programs in accordance with the dictates of the equal protection clause.

The solution to the problem presented in *DeFunis,* on the other hand, appears to be somewhat more elusive. It seems clear that if an admissions policy like that utilized by the Washington Law School comes again before the Court, it will probably be declared unconstitutional. If, however, school authorities take heed of Justice Douglas' message, they may be able to promote the goals they seek through a procedure consistent with the demands of equal protection. A proper starting point would be a reevaluation of present methods of selecting applicants. Though Justice Douglas' suggestion that LSAT's should be abolished is likely to be met by staunch opposition, a compromise involving the concept of individual evaluation appears to be a viable solution.